1961

Agnes Lundberg v. Le Grand P. Backman : Brief of Respondent in Opposition to Appellant's Petition for Rehearing

Utah Supreme Court

Milton V. Backman; Attorney for Respondent;

IN THE SUPREME COURT
of the
STATE OF UTAH

AGNES LUNDBERG,
Plaintiff and Appellant,

vs.

LEGRAND BACKMAN,
Defendant and Respondent,

Case
No. 9212

RESPONDENT'S BRIEF IN OPPOSITION TO APPELLANT'S PETITION FOR REHEARING.

Milton V. Backman
Attorney for Respondent,
1111 Deseret Bldg.
Salt Lake City, Utah.

INDEX

	Page
Argument	1
Conclusion	4

IN THE SUPREME COURT

of the

STATE OF UTAH

AGNES LUNDBERG,
Plaintiff and Appellant,

vs.

LEGRAND BACKMAN,
Defendant and Respondent,

Case
No. 9212

Appellant in her petition for rehearing and brief in support thereof says the court has erred in sustaining the order of the lower court in it's granting a summary judgment in favor of respondent and against appellant, this because as appellant contends, there is a genuine issue of fact as to whether or not respondent had terminated the relationship of attorney and client. It is evident however, that a trial would not produce evidence which is not already before the court as to such issue. We cannot understand how a termination of a relationship which is not even asserted to have been established could come about unless the law (not facts) establishes such relationship.

In this case appellant has at no time either in her pleading or in her affidavits either alleged or contended that there was ever an agreement between appellant and respondent under which respondent would represent appellant beyond the trial of the case in the lower court. Therefore if there was an obligation as is contended by appellant it would be because the law imposes that obligation on respondent if this was the law. But this court has held that there is no obligation for an attorney to carry on defendant's case beyond the final judgment without an agreement to do so. Appellant further contends that the issue is not whether respondent was employed to appeal appellant's case but the issue is whether respondent violated his obligation as an attorney in exercising care in the performance of his duties. This too is a question of law which the court must determine from the facts before it, the pleadings and affidavits. We cannot see how without appellant having pleaded that such obligation existed she could produce evidence to prove that which appellant has not pleaded.

Counsel for appellant argues that not once did respondent ever advise appellant that he considered their relationship terminated. That statement is not true and the record will not bear out such statement. The record shows that appellant in her own affidavit stated that she contacted attorney John H. Stone of this city who advised her he was unable to perfect an appeal to the Utah Supreme Court until respondent executed and filed a withdrawal from the case; that appellant contacted respondent and was advised by him that he *had withdrawn* and this information was again relayed to Mr. Stone.

It is to be noted that appellant does not say that she was advised the respodent *would* withdraw but that he *had with-*

drawn. Again respondent in his deposition testified that within a few days after the trial of the case out of which this action arose he told appellant he would not serve her any more because of the attitude appellant had taken toward respondent.

Justice Crockett in his dissenting opinion states that the evidence which the court must presume is that respondent did not make it known to appellant that he would not represent appellant in proceedings subsequent to the entry of judgment. It is most difficult to follow the reasoning of Justice Crockett when appellant admits that she was advised that respondent had withdrawn from the case. And again as Justice Crockett quotes from appellant's second affidavit it is evident that appellant was told by respondent that he had withdrawn from the case. True appellant goes on and avers that Mr. Backman had not in fact done so, but that does not make a contradiction or a dispute when appellant admits she was told respondent had withdrawn. We contend that in summary judgment proceedings the parties are bound by their admissions.

Then too it is evident from appellant's affidavit that appellant not only had time to perfect an appeal, but did contact other counsel regarding an appeal within the appeal period all of which goes to show that appellant knew that respondent would not represent appellant after the case had been decided in the lower court.

Justice Crockett says respondent filed a motion for a new trial on appellant's behalf which was filed too late; and did the same thing with respect to the filing of a belated notice of appeal on her behalf. No notice of appeal was ever filed by respondent.

It seems from Justice Crockett's dissenting opinion that because both appellant and respondent thought the lower court

erred in it's decision, some duty rested upon respondent to follow the case through even though there was no allegation of an agreement. It is not unusual, but on the contrary usual for attorneys in losing a case to not agree with the court and to conclude that the court erred.

The only thing shown in this case is that respondent did without any obligation on his part file a motion for new trial after the time had expired but before the appeal period had expired, and respondent filed a withdrawal, which was not required under our rules, after the appeal period had expired. Appellant could not have been misled by respondent's having filed a belated motion for new trial because she avers that she had no knowledge of respondent's having filed the same.

Because other counsel told appellant they could not represent her until respondent filed a formal withdrawal when that was not the law, does not give rise to an action on behalf of appellant against respondent.

CONCLUSION

There is no genuine issue for a court or jury to decide in this case and respondent should not be placed in the embarrassing position in which he would find himself if compelled to defend such a case at a trial and especially risk a decision by a jury where there is no more evidence of a cause of action than is shown in this case.

Respectfully submitted,

M. V. BACKMAN,
Attorney for respondent